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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re CLOROX CONSUMER LITIGATION	Master File No. 12-cv-00280-SC
	CLASS ACTION
This Document Relates To:	PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS CONSOLIDATED CLASS ACTION COMPLAINT
ALL ACTIONS.	

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I. STATEMENT OF FACTS

Defendant The Clorox Company ("Clorox" or "Defendant") is a leading manufacturer of cat litter in the United States. In 1984, Clorox began producing Fresh Step. According to Clorox's website, Fresh Step prides itself on being the "only litter that contains carbon." [Consolidated Class Action Complaint ("Complaint") [Dkt. No. 29], ¶¶26-27].[1]

In the fall of 2010, Clorox began an extensive two-fold marketing and advertising campaign via television, claiming that: (1) Fresh Step's carbon-containing cat litter is more effective at eliminating cat odors than other cat litters; and (2) as a result, cats "choose" Fresh Step over other cat litters. These superiority claims went far beyond merely promoting the odor-eliminating capabilities of carbon. Indeed, they are provably false, misleading, and likely to deceive a reasonable consumer. [¶28].

Clorox's advertising campaign consisted of multiple television commercials, including visuals, voiceovers, and demonstrations, representing the purported superiority of Fresh Step litter in eliminating odor, as well as cats' preferences towards Fresh Step litter precisely because of its carbon content, as opposed to other, "inferior" odor-eliminating ingredients, such as baking soda. [¶29]. Clorox first began airing its false, misleading, and deceptive commercials around October 2010 (the "First Commercials"). One commercial, for example, overtly stated that cats prefer Fresh Step over other litters, because cats "know" Fresh Step is better at eliminating odors than Arm & Hammer's Super Scoop. [¶30]. Defendant aired multiple other commercials that echoed these same verbal and visual messages, showing cats consistently "choosing" Fresh Step over other, carbonless brands. [¶31].

In February 2011, Clorox launched a new false, deceptive, and misleading advertising and marketing campaign, which continued to depict cats' purported preference towards Fresh Step litter, but, in addition, the new commercials expressly stated that "Fresh Step Scoopable litter with carbon . . . is more effective at absorbing odors than baking soda" (the "Second Commercials"). [¶32]. One of the Second Commercials showed two laboratory beakers, one

[1] All "¶__" and Ex.__" references are to the Complaint, unless otherwise indicated.

filled with a black substance labeled "carbon" and the other filled with a white substance labeled "baking soda." Green gas was then shown floating through the beakers; the green gas in the Fresh Step beaker rapidly dissipated, while the gas in the baking soda beaker barely dissipated. During this "scientific" demonstration, a voiceover stated: "That's why Fresh Step Scoopable has carbon, which is more effective at absorbing odors than baking soda." [¶33].

Plaintiffs allege that the superiority representations made in Clorox's commercials described above are provably false, misleading, and likely to deceive a reasonable consumer because, in fact: (1) Fresh Step's carbon-containing cat litter is not more effective at eliminating odors than other cat litters; and (2) cats do not "choose" Fresh Step over other cat litters. [¶35].

In response to Clorox's First Commercials, which represented, among other things, that cats "prefer" Fresh Step carbon-based cat litter over baking soda-based cat litter, Church & Dwight ("C&D"), the creator of Arm & Hammer's baking soda-based cat litter, Super Scoop, commissioned a study to determine the frequency with which cats would reject either litter when used in the cat's litter box (the "C&D Study"). [¶37].

The results of the C&D Study conclusively proved that cats do not reject baking soda-based cat litter more than they reject carbon-based cat litter. In fact, the C&D Study proved just the opposite, that cats reject Defendant's carbon-based Fresh Step more often than Arm & Hammer's baking soda-based Super Scoop. Indeed, less than 4% of the cats involved in the study rejected their litter box and relieved themselves elsewhere in the home when the litter box was filled with C&D's Super Scoop cat litter, while slightly more than 5% of the cats involved in the study rejected their litter box when the litter box was filled with Clorox's Fresh Step cat litter. [¶38]. Put differently, 25% more cats rejected litter boxes filled with Clorox's Fresh Step than rejected litter boxes filled with C&D's Super Scoop cat litter.

In response to Clorox's Second Commercials, which represented, among other things, that Clorox's carbon-containing Fresh Step cat litter is more effective at eliminating odors than other cat litters, C&D commissioned an independent study to run a sensory laboratory test to compare the cat waste odor elimination performance of Fresh Step with carbon to one of Arm &

Hammer's cat litters with baking soda, Double Duty (the "Independent Study"). [¶40].

In the Independent Study, panelists were asked to rate the odor emanating from two litter boxes, one filled with Fresh Step and one filled with Double Duty, over the course of ten days. On every single day of the ten-day study, the panelists' average odor rating for C&D's Double Duty cat litter with baking soda was lower than the average odor rating for Clorox's Fresh Step carbon-based cat litter. These results clearly demonstrate that Arm & Hammer's cat litter was significantly superior to Fresh Step at the *95%* confidence level in terms of cat waste odor elimination overall. [¶41].

In response to the First Commercials, C&D filed a lawsuit against Clorox alleging that Clorox's claims that Fresh Step has superior odor-eliminating capabilities and that cats prefer carbon-based Fresh Step to baking soda-based Super Scoop were false and misleading. As a result, Clorox immediately ceased airing the First Commercials, and C&D dismissed its case without prejudice. [¶43].

C&D reacted to the Second Commercials by filing another lawsuit in March 2011, alleging that Clorox's representations that Fresh Step cat litter products with carbon are superior to Arm & Hammer's cat litter products with baking soda at eliminating cat waste odor were false, misleading, and deceptive to consumers. [¶44]. C&D sought to enjoin Clorox from making these false claims about Fresh Step, and brought claims against Clorox under the federal Lanham Act, New York's General Business Law, and for unfair competition under New York common law, among others. [*Id.*].

On January 4, 2012, Judge Jed S. Rakoff of the United States District Court for the Southern District of New York entered an Opinion and Order enjoining Clorox from airing the commercials portraying the beaker test, finding Clorox's claims about the odor elimination abilities of carbon as compared to baking soda were "literally false." [¶45]. In his opinion, Judge Rakoff held:

> In short, because the Jar Test on which Clorox based its claims is unreliable and, even if it were reliable could not possibly support Clorox's implied claims about the relative merits of carbon and baking soda in cat litter, the Court finds Clorox's claims are literally false.
>
> * * *

> Put simply, Clorox, cloaking itself in the authority of a "a lab test," made literally false claims going to the heart of one of the main reasons for purchasing cat litter. In such circumstances, where the misrepresentation is so plainly material on its face, no detailed study of consumer reactions is necessary to conclude inferentially that Clorox is likely to divert customers from C&D's products to its own unless the offending commercial is enjoined.

[¶46].[2]

Despite Judge Rakoff's Order, Clorox continues to profit from its false and deceptive marketing campaign based on the purported "superiority" of carbon-based cat litter. Plaintiffs allege that purchasers of Fresh Step have been deceived by Clorox into believing that they purchased a product that had better odor eliminating abilities than its competitors and was preferred by cats, paying a price premium for this deceptively advertised product. [¶48].

II. STANDARD OF REVIEW

This Court has recently articulated the standard of review on a motion to dismiss:

> A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir .1988). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. at 663. (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The allegations made in a complaint must be both "sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it" and "sufficiently plausible" such that "it is not unfair to require the opposing party to be subjected to the expense of discovery." *Starr v. Baca*, 633 F.3d 1191, 1204 (9th Cir. 2011).

Lam v. Gen. Mills, Inc., 11-5056-SC, 2012 WL 1656731, at *2 (N.D. Cal. May 10, 2012) (Conti, J.).

A. The Complaint Sufficiently Alleges that Defendant's Representations in Its Advertising Campaign Were False and Misleading

Plaintiffs sufficiently allege a claim for false advertising under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumers Legal Remedies Act ("CLRA"). Pursuant to the FAL, "[i]t is unlawful . . . to make and disseminate . . . any statement . . . which is untrue or misleading, and which is known, or by the exercise of

[2] Emphasis added, citations, internal quotations, and footnotes omitted unless otherwise indicated.

reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. §17500; *see also Cardenas v. NBTY, Inc.*, No. CIV. S-11-1615 LKK/CKD, 2012 WL 1593196, at *9 (E.D. Cal. May 4, 2012). A claim for false advertising will survive a motion to dismiss where the plaintiff can cite to specific studies directly refuting a defendant's false and misleading advertising scheme. *Id.* Plaintiffs have undoubtedly met this burden. Thus, Defendant's contention that Plaintiffs do not state a plausible claim must fail.

B. Defendant's Contention that the Allegations Amount to a Mere Claim of "Lack of Substantiation" Are Without Merit

Defendant improperly attempts to recast the Complaint as being premised solely on allegations that Defendant's representations lack substantiation, which it contends are not actionable. Contrary to Defendant's arguments, however, Plaintiffs allege that the following representations by Defendant are provably false: (1) Fresh Step, which contains carbon, is more effective at eliminating cat odors than other cat litters that do not contain carbon; and (2) cats "choose" Fresh Step over other cat litters due to its purported ability to eliminate odors. [¶1]. Tellingly, Defendant concedes, as it must, that Plaintiffs alleged Defendant's representations to be false and misleading. [Clorox's Motion to Dismiss ("MTD") [Dkt. No. 43] at 19].[3]

Having mischaracterized the Complaint, Defendant proceeds to attack its straw man by relying on a series of cases pertaining to substantiation claims which are inapplicable here. For instance, in *Barrera v. Pharmavite, LLC*, No. 11-4153, Dkt. No. 31 (C.D. Cal Sept. 19, 2011), plaintiff's claim that "defendant did not have competent scientific evidence to support its health benefit claims that its TripleFlex supplements would improve joint comfort, mobility and flexibility" was dismissed because "there is no private remedy for unsubstantiated advertising [under California law]." *Id.* at 3-4; *see also* MTD at 13. In other words, the plaintiff relied solely on its lack of substantiation claim and did not provide any allegations to refute the truth of the defendant's statements or otherwise allege that the representations were false.

[3] "Plaintiffs allege that Clorox engaged in 'fraudulent business acts and practices' though [sic] its television advertising. Compl. ¶¶87, 88; *see also id.* ¶73(d) (alleging Clorox sold Fresh Step 'with intent not to sell it as advertised'); *id.* ¶93 (alleging Clorox knew its advertising was false or misleading)." [MTD at 19].

Equally unavailing is Defendant's reliance on *Chavez v. Nestle USA, Inc.*, No. 09-9192-GW-CW, 2011 WL 2150128, at *5 (C.D. Cal. May 19, 2011), in which the court granted defendant's motion to dismiss plaintiffs' claims that "Nestle lacked substantiation for its claim that DHA, an ingredient in its juice products, may help support early-age brain and eye development" because "[p]rivate plaintiffs are not authorized to demand substantiation for advertising claims." MTD at 14-15; *Chavez*, 2011 WL 2150128, at *5. As in *Barrera*, the *Chavez* plaintiff alleged solely a lack of substantiation claim and did not set forth allegations of falsity as Plaintiffs have done at length here.

The weakness of Defendant's position is highlighted by its reliance on *Stanley v. Bayer Healthcare LLC*, No. 11cv862-IEG-BLM, 2012 WL 1132920 (S.D. Cal. Apr. 3, 2012), a case in summary judgment. There, plaintiff alleged that defendant's health claims that its probiotic supplements "promote[] overall digestive health and help[] defend against occasional diarrhea and other gastrointestinal problems" were false and misleading because "they lack[ed] proper scientific substantiation" (*id.* at *4). Rather than presenting any evidence that the claims were actually false or likely to deceive a reasonable consumer, plaintiff's experts repeatedly pointed to the lack of substantiation for defendant's claims. Accordingly, the court held that "[p]laintiff has failed to show there is a genuine issue of material fact ***precluding entry of summary judgment*** in favor of Defendant on her false advertising claims under the UCL and CLRA." *Id.* at *10.

In contrast, here, Plaintiffs do not allege that Defendant's claims merely lack substantiation. Instead, Plaintiffs' Complaint contains myriad detailed allegations that Defendant's representations in its television commercials were clearly and provably ***false***. Specifically, Plaintiffs allege that "[t]he superiority representations made in Clorox's commercials . . . are false, misleading, and likely to deceive a reasonable consumer because, in fact: (1) Fresh Step's carbon-containing cat litter is not more effective at eliminating cat odors than other cat litters; and (2) cats do not 'choose' Fresh Step over other cat litters."[4] [¶35]. In

[4] In this regard, Plaintiffs repeatedly allege that Defendant's representations of Fresh Step's superiority are false and misleading. *See, e.g.*, ¶¶2-3 ("***Despite the falsity of its claims***, Clorox boasts about the purported 'superiority' of the odor eliminating capabilities of carbon throughout its television advertising campaign."); ¶7 ("Clorox's superiority representations are

addition, unlike the cases that Defendant improperly relies on, Plaintiffs explicitly allege that "scientific studies ***have shown*** [that] carbon-based cat litter is not superior to other cat litters as far as odor elimination is concerned, and moreover, cats ***do not*** 'choose' Fresh Step cat litter over other, baking soda-based cat litters." [¶7]. In fact, as Defendant conveniently ignores, Plaintiffs devote an entire section of their Complaint summarizing two separate scientific studies proving that Defendant's claims are false and misleading.[5] [¶¶37-42].

Judge Lawrence K. Karlton of the Eastern District of California has recently upheld claims similar to those alleged here. In *Cardenas*, plaintiff claimed that "clinical cause and effect studies have found no causative link between glucosamine hydrocholoride supplementation and joint renewal or rejuvenation." 2012 WL 1593196, at *1. Thus, the plaintiff alleged that defendant's representations that taking the recommended number of Osteo Bi-Flex tablets will help "promote mobility, renew cartilage, maintain healthy connective tissue," and "improve joint comfort" were, therefore, false and misleading. *Id.* at *1-*2. As in the present case, the defendant attempted to argue that plaintiff's claims were for a mere lack of substantiation and should therefore be dismissed. Judge Karlton rejected that argument and held that "[i]f Plaintiff's assertions are true, and [c]linical cause and effect studies have been unable to confirm a cause and effect relationship between [defendant's product] and joint renewal or rejuvenation, . . . then it stands to reason that Defendants' representations that [defendant's

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false, misleading, and likely to deceive a reasonable consumer."); ¶28 ("These superiority claims went far beyond merely promoting the odor-eliminating capabilities of carbon. Instead, ***they are false, misleading, and likely to deceive a reasonable consumer***.").

[5] This section summarizes a study performed by C&D, the creator of Arm & Hammer's baking soda-based cat litter, Super Scoop, to determine the frequency with which cats would reject either litter when used in a cat's litter box. The C&D Study conclusively proved that cats do not reject baking soda-based cat litter more than they reject carbon-based cat litter, but, in fact, proved the opposite. Additionally, in response to Defendant's claims in a commercial that Defendant's carbon-containing Fresh Step cat litter is more effective at eliminating odors than other cat litters, C&D commissioned the Independent Study to run a sensory laboratory test to compare the cat waste odor elimination performance of Fresh Step with carbon to one of Arm & Hammer's cat litters with baking soda, Double Duty. In connection with the Independent Study, panelists were asked to rate the odor emanating from the two litter boxes over the course of ten days. On every single day of the ten-day study, the panelists rated Double Duty cat litter with baking soda to have a lower odor rating than Clorox's Fresh Step litter. As alleged in the Complaint, the results of these studies demonstrate that Defendant's commercials contained false, misleading, and deceptive claims regarding Fresh Step's purported superiority.

product] help[s] with joint flare-ups are actually false." *Id.* at *9. As in *Cardenas*, accepting as true, as the Court must on this motion, Plaintiffs' assertions that "scientific studies have shown carbon-based cat litter is not superior to other cat litters as far as odor elimination is concerned, and moreover, cats do not 'choose' Fresh Step cat litter over other, baking soda-based cat litter," then Plaintiffs have well-pled that Defendant's representations are actually false. Accordingly, the Court should deny Defendant's motion.

C. Plaintiffs Do Not Seek Preclusive Effect in Connection with the New York Judge's Preliminary Injunction at This Time

Defendant argues that Plaintiffs cannot rely on the preliminary injunction issued by the District Court in the Lanham Act matter to claim that Defendant's claims violate California consumer protection laws. Plaintiffs seek to do no such thing. Plaintiffs are not seeking preclusive effect in connection with the preliminary injunction at this point in time. Instead, Plaintiffs simply advance evidence used in the Southern District of New York action to support its allegations that Defendant's representations are actually false and misleading.

III. CLAIMS BASED ON DEFENDANT'S STATEMENTS THAT CATS "LIKE" OR "ARE SMART ENOUGH TO CHOOSE" ITS FRESH STEP CAT LITTER ARE ACTIONABLE CLAIMS

Defendant next contends that claims challenging its representations that cats are "smart enough" to choose its Fresh Step cat litter and that cats "know" that they "like" litter boxes with Fresh Step inside (together, "preference statements") should be dismissed as mere puffery.[6] Contrary to Defendant's position, however, these representations are the type of specific, measurable statements upon which a reasonable consumer would rely and which are routinely held to not constitute puffery. Accordingly, Defendant's motion to dismiss claims involving the preference statements should be denied.

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[6] The preference statements are just some of the statements being challenged by Plaintiffs. [*See, e.g.*, ¶¶28, 32-34]. Notably, Defendant does not contend that the other statements are puffery, thereby conceding that at least some of the statements being challenged by Plaintiffs are actionable statements under the law. In the event the Court determines that some of the statements are not actionable, the claims should nevertheless survive against the remaining statements. "[W]here at least some actionable statements have been pled, a claim cannot be dismissed on the ground that some statements constitute mere puffery." *Franklin Fueling Sys., Inc. v. Veeder-Root Co.*, CIV.S-09-580 FCD/JFM, 2009 WL 2462505, at *7 (E.D. Cal. Aug. 11, 2009).

Puffery is defined as "outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers." *In re Ferrero Litig.*, 794 F. Supp. 2d 1107, 1115 (S.D. Cal. 2011) (citing *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.*, 911 F.2d 242, 246 (9th Cir. 1990)) (holding it would not be appropriate to dismiss claims involving certain false and misleading statements as puffery because "it would not be impossible for Plaintiffs to prove that a reasonable consumer would be deceived by the statements"); *see also Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1125-26 (N.D. Cal. 2010) (holding that the terms "wholesome" and "smart choices made easy" cannot be deemed to be puffery at the pleading stage of the litigation because they could arguably mislead a reasonable consumer). While product claims that are vague or highly subjective may amount to puffery, "misdescriptions of specific or absolute characteristics of a product are actionable." *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997); *see Ferrero*, 794 F. Supp. 2d at 1115. Thus, a statement that is quantifiable and that makes a claim as to the specific characteristics of a product may be an actionable statement of fact. *See Autodesk, Inc. v. Dassault Systemes Solidworks Corp.*, 685 F. Supp. 2d 1001, 1017 (N.D. Cal. 2009) (holding that statement claiming that product will work with files created by any version of AutoCAD is a measurable claim that does not constitute puffery). Such is the case with the preference statements at issue here – they are concrete, factual assertions that are measurable and describe a specific characteristic of the product, and thus are capable of inducing consumer reliance.

The preference statements make a specific claim about a product characteristic that is measurable – *i.e.*, what cats "prefer" or "like" in a cat litter. Importantly, the preference statements are not only verbally communicated in the commercials through an announcer's voiceover, but also through various demonstrations. These demonstrations visually communicated the specific "preference" characteristic of Defendant's cat litter by showing cats rejecting a litter box filled (and labeled) with a competitor's brand of cat litter and choosing instead a litter box filled (and labeled) with Fresh Step cat litter. [¶¶29-31; Exs. A-C]. For example, one commercial depicted four different cats, each one purportedly rejecting the

competitor's cat litter for the so-called preferred Fresh Step cat litter. [¶30; Ex. A].

Moreover, these unambiguous visual depictions showing a series of cats consistently choosing Fresh Step cat litter over a competing brand give the impression that the preference statements are based upon scientific testing and are not merely "outrageous" generalized statements. *See Southland*, 108 F.3d at 1145 ("A specific and measurable advertisement claim of product superiority based on product testing is not puffery."); *see also W.L. Gore & Assocs., Inc. v. Totes, Inc.*, 788 F. Supp. 800, 809 (D. Del. 1992) (numerical comparison that product is seven times more breathable "gives the impression that the claim is based upon independent testing" and "is not a claim of general superiority or mere puffing"). In fact, the preference statements at issue here are not only provably false, but are also easily quantifiable. In an action brought against Defendant by one of its competitors, C&D, which challenged these same preference statements as false and misleading, C&D commissioned a study to evaluate the performance of its product versus Fresh Step. [¶¶37-39]. Specifically, the C&D Study, which included 158 cats, was designed to determine the frequency with which cats would reject either litter when used in the cat's everyday litter box. The results demonstrated that cats do not reject C&D's cat litter (less than 4% of cats rejected) more than Defendant's cat litter (slightly more than 5% of cats rejected), thus quantifying cats' preferences. [¶38]. The measurability of Defendant's preference statements makes them actionable as to whether they are false or misleading. *See In re Century 21-RE/MAX Real Estate Advertising Claims Litig.*, 882 F. Supp. 915, 926 (C.D. Cal. 1994) (holding the statement that RE/MAX agents outsell other agents "three to one" is a specific assertion and does not constitute puffery); *Autodesk*, 685 F. Supp. 2d at 1018.

Defendant's contention that the preference statements constitute puffery because they are "humorous" and "light-hearted" simply ignores the specific representations made in the advertising, which would unquestionably lead a reasonable consumer to rely on them (as Defendant intended) because of the impression of actual testing depicted in the demonstrations. For all of the above reasons, Defendant's motion to dismiss the claims involving the preference statements should be denied.

IV. PLAINTIFFS SUFFICIENTLY SATISFY RULE 9(B) IN THEIR STATUTORY CLAIMS

Defendant argues, albeit unpersuasively, that Plaintiffs fail to satisfy Rule 9(b)'s requirements. Defendant is mistaken. The purpose of Rule 9(b) is to require a plaintiff to be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Pelletier v. Pac. WebWorks, Inc.*, No. CIV S-09-3503 KJM KJN, 2012 WL 43281, at *3 (E.D. Cal. Jan. 9, 2012) (quoting *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)). Plaintiffs have clearly satisfied their pleading obligations.

In *Von Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066 (E.D. Cal. 2010), plaintiffs alleged that, during the class period, defendant made false or misleading representations when it advertised that its Snapple beverages were "All Natural" and superior to other juice drinks. In support of their claims, plaintiffs submitted examples of the labels on several Snapple beverage bottles all containing the term "All Natural." Plaintiffs alleged that the labeling deceived consumers because the juice drinks contained unnatural products. In addition, plaintiffs further claimed that if they had not been deceived by the labels on the products, they would not have purchased defendant's juice drinks, but would have purchased alternative drink products. Judge Frank C. Damrell, Jr. held that "[t]hese allegation[s] are sufficient to establish the 'time, place, and specific content' requirements of Rule 9(b)." *Id.* at 1077. Accordingly, the court denied defendant's motion to dismiss plaintiffs' false advertising claims. *Id*. at 1078.

Similarly, in *Vicuna v. Alexia Foods, Inc.*, No. C 11-6119 PJH, 2012 WL 1497507 (N.D. Cal. Apr. 27, 2012), plaintiffs brought a class action lawsuit against defendant, who produced frozen food products, including potato products, alleging that defendant misrepresented the quality of its products. *Id*. at *1-*2. Judge Phyllis J. Hamilton held that the complaint "adequately states a claim under the CLRA, the UCL, and the FAL." *Id.* at *2. In so deciding, the court noted that "[w]hile some of the allegations of fraud and misrepresentation are rather skimpy, the gist of the claims sounding in fraud is that plaintiffs were deceived by the designation of 'All Natural' on the packages of potato products that they purchased . . . . This is

sufficient to put Alexia on notice of the claims asserted against it, and the court finds overall that the claims are pled sufficiently to withstand a Rule 12(b)(6) motion to dismiss." *Id.* Judge Hamilton added that "numerous factual issues make this matter inappropriate for decision on a 12(b)(6) motion." *Id.*

Likewise, Plaintiffs' allegations here are sufficiently particular to satisfy Rule 9(b)'s requirements. For instance, as in *Von Koenig*, in support of their allegations that Defendant's claims that Fresh Step litter was superior to other cat litters were false and misleading, Plaintiffs submitted examples of Defendant's nationwide advertising campaign consisting of multiple television commercials. Specifically, Plaintiffs submitted story board images of the following: (1) Defendant's commercials which first aired around October 2010 where Defendant "overtly stated that cats prefer Fresh Step over other litters, because cats 'know' Fresh Step is better at eliminating odors than Arm & Hammer Super Scoop" [¶30; Ex. A]; (2) Defendant's December 27, 2010 and January 3, 2011 commercials depicting cats "choosing" Fresh Step over other, carbonless brands [¶31; Exs. B-C]; and (3) Defendant's commercials that aired in February 2011 where Defendant expressly stated that "Fresh Step Scoopable litter with carbon . . . is more effective at absorbing odors than baking soda" [¶¶33-34; Exs. D-E]. In this regard, Plaintiffs have alleged the "when" (the approximate dates the advertisements aired) [¶¶26-36], the "what" (the specific content of such advertisements) [¶¶4-5, 26-36; Exs. A-E], and the "how" (via an "extensive, nationwide marketing and advertising campaign") [¶1]. Moreover, Plaintiffs have specifically alleged that each Plaintiff was "exposed to and saw Clorox's marketing and advertising claims," and in reliance of such claims "purchased Fresh Step . . . , and suffered injury" as a result. [¶¶15-21]. Accordingly, Plaintiffs' claims are specific enough to put Defendant on notice of the claims asserted against it and, therefore, should not be dismissed.

V. EXPRESS WARRANTY

A. Breach of Express Warranty

"Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods

shall conform to the affirmation or promise." *In re Hydroxycut Mktg. & Sales Practices Litig.*, 801 F. Supp. 2d 993, 1007 (S.D. Cal. 2011) (citing U.C.C. §2-313)). Here, Plaintiffs allege that Defendant made several affirmations of fact and/or promises regarding Clorox's Fresh Step to consumers via its product labeling[7] and two series of television commercials. [¶¶28-34, 158].

Specifically, Plaintiffs allege that Defendant made the following affirmations of fact and/or promises regarding Clorox's Fresh Step: (1) Clorox's "Fresh Step Scoopable litter with carbon is better at eliminating odors" than other cat litters containing baking soda; (2) Clorox's Fresh Step Scoopable cat litter "has carbon, which is more effective at absorbing odors than baking soda"; and (3) cats "are smart enough to choose" carbon-based Fresh Step "with less odors" over other cat litters with baking soda. [¶159].

Accordingly, Plaintiffs allege that Defendant's aforementioned affirmations of fact and/or promises created an express warranty that Clorox's Fresh Step Scoopable litter would conform to those affirmations and/or promises. [*See* ¶158 ("The terms of that contract include the promises and affirmations of fact made by Clorox on its product labels and through its marketing campaigns, as described above.")]. Plaintiffs ultimately allege that "Clorox breached the terms of this contract, including the express warranties, with Plaintiffs and the Class by not providing the Fresh Step products as advertised and described above[,]" and that they were damaged as a result of Defendant's breach. [¶¶161-162, 164].

Despite these clear, detailed, and well-pled allegations of breach of express warranty, Defendant argues that: (1) Plaintiffs have failed to "specifically allege[] which representations [they] saw, heard, or read"; (2) Plaintiffs have failed to allege with adequate specificity their "reasonable reliance on the particular commercial or advertisement[]"; (3) none of the challenged statements constitute "an affirmation of fact or a promise[]"; and (4) Plaintiffs lack privity with Defendant. [MTD at 21-22]. As detailed below, each of these arguments is meritless.

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[7] Defendant argues that "Plaintiffs have also abandoned their claims related to statements made on Fresh Step's packaging and on Clorox's website. The amended complaint is thus limited to Clorox's Fresh Step television commercials." [MTD at 10 n.3]. This argument, however, ignores Plaintiffs' allegation that "[t]he terms of that contract include the promises and affirmations of fact made by Clorox on its ***product labels*** and through its marketing campaigns, as described above." [¶158].

B. Plaintiffs Have Specifically Alleged Which Representations They Were Exposed to

Citing *Hydroxycut* as support, Defendant summarily argues that Plaintiffs have failed to "specifically allege[] which representations [they] saw, heard, or read and, thus, formed the basis of their bargain." [MTD at 21]. Even a cursory review of the Complaint demonstrates that Defendant is mistaken, and the *Hydroxycut* case only serves to highlight this. There, consumers brought a class action against the manufacturer of 14 different Hydroxycut weight loss products, which plaintiffs alleged were falsely marketed as safe and effective. 801 F. Supp. 2d at 999. The manufacturer conveyed its false statements to consumers "through an extensive advertising campaign in a variety of media, including television, newspapers, magazines, direct mail, the internet, point-of-sale displays, and on the product labels." *Id.* In their complaint, plaintiffs alleged, *inter alia*, that "each of the named Plaintiffs was exposed to and read Defendants' advertising claims, including the representations on the Products' labeling." *Id.* at 1000.

The court ultimately dismissed plaintiffs' express warranty claim because "Plaintiffs have not specifically alleged which representations they saw, heard, or read, Plaintiffs have not sufficiently pled which affirmations or promises formed the basis of their bargain." *Id.* at 1008. The court explained that "[t]he FAC describes representations made on the hydroxycut.com website, a television commercial, GNC's website, and the Products' packaging. However, it is unclear whether the same representations are made on the packaging of each of the 14 Hydroxycut products at issue. The FAC does not distinguish between the Products." *Id.* at 1006.

The allegations in the instant case are markedly different from those which formed the basis of the court's decision in *Hydroxycut*. Plaintiffs' claims here do not implicate more than 14 different products that were the subject of widely varying advertising campaigns. Indeed, the instant case is much simpler: ***one*** product, ***two*** series of substantively similar commercials. There is simply no confusion with respect to "which affirmations or promises formed the basis of [the] bargain[,]" as Defendant's commercials and product labeling conveyed the same uniform messages, that: (1) Clorox's "Fresh Step Scoopable litter with carbon is better at eliminating odors" than other cat litters containing baking soda; (2) Clorox's Fresh Step Scoopable cat litter

"has carbon, which is more effective at absorbing odors than baking soda"; and (3) cats "are smart enough to choose" carbon-based Fresh Step "with less odors" over other cat litters with baking soda. [*See* ¶159].

Defendant's citations to *Nabors v. Google, Inc.*, No. 5:10-CV-03897, 2011 WL 3861893, at *4 (N.D. Cal. Aug. 30 2011), *McKinney v. Google, Inc.*, No. 5:10-CV-01177 EJD, 2011 WL 3862120, at *4 (N.D. Cal. Aug. 30, 2011), and *Edmunson v. Proctor & Gamble Co.*, No. 10-CV-2256-IEG NLS, 2011 WL 1897625, at *6 (S.D. Cal. May 17, 2011), likewise, do not support its position. *Nabors* and *McKinney* are two related cases where consumers brought class actions against Google for the false and deceptive marketing of its 3G mobile phone. In both cases, plaintiffs alleged that while Google marketed its phone as possessing 3G capability, plaintiffs experienced 3G connectivity only a fraction of the time. *Nabors*, 2011 WL 3861893, at *1; *McKinney*, 2011 WL 3862120, at *2. Plaintiffs argued that the defendant's general assertion that its phone "has 3G network capability" constituted an express warranty. *Nabors*, 2011 WL 3861893, at *4; *McKinney*, 2011 WL 3862120, at *4. The court dismissed plaintiffs' breach of express warranty claim, holding that:

> General assertions about representations or impressions given by Google about the phone's 3G capabilities are not equivalent to a recitation of the exact terms of the underlying warranty . . . . At the least, Nabors must identify the particular commercial or advertisement upon which he relied and must describe with the requisite specificity the content of that particular commercial or advertisement.

Id. The present Complaint does not suffer from any such infirmity, as Plaintiffs have pointed to several specific representations upon which they relied, including the specific content of those representations.

C. Plaintiffs Have Specifically Alleged Their Reasonable Reliance on Defendant's Representations

Defendant next contends, again, in summary fashion and without argument, that "Plaintiffs have also failed to allege with adequate specificity their reasonable reliance on the particular commercial or advertisement." [MTD at 21]. Defendant is incorrect for at least two reasons. First, it is well-settled that "reliance" is not an element of an express warranty claim. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab.*

Litig., 754 F. Supp. 2d 1145, 1182-83 (C.D. Cal. 2010) (holding that "Plaintiffs are not required to allege reliance" in breach of express warranty claim); *Weinstat v. Dentsply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1227 (2010) (holding that "[p]re–Uniform Commercial Code law governing express warranties required the purchaser to prove reliance on specific promises made by the seller. . . . The California Uniform Commercial Code, however, does not require such proof.");[8] *Keith v. Buchanan* 173 Cal. App. 3d 13, 23 (1985) (explaining that under the U.C.C., "a buyer need not show that he would not have entered into the agreement absent the warranty or even that it was a dominant factor inducing the agreement").

Second, regardless of whether or not reliance is required in an express warranty claim, ***Plaintiffs have properly pled their reasonable reliance on Defendant's representations***: "[Plaintiff] was exposed to and saw Clorox's marketing and advertising claims, purchased Fresh Step ***based on those claims***, and suffered injury in fact because of the unfair and deceptive trade practices described herein." [¶¶15-21]. Plaintiffs and the Class were exposed to these statements and ***reasonably relied upon them*** in their purchase of Fresh Step. [¶160].

Judge Jacqueline H. Nguyen of the Central District of California recently certified a nationwide breach of express warranty claim by dentists against a dental implant manufacturer. *Yamada v. Nobel Biocare Holding AG*, 275 F.R.D. 573, 576, 580-81 (C.D. Cal. 2011). The defendants in *Yamada* argued that the breach of express warranty claims would not be susceptible to class-wide proof because there would be no way for the manufacturer's warranties to become part of the "basis of the bargain" absent proof of reliance. The court rejected this argument noting, "because Plaintiff does assert reliance on the marketing literature and manual, the Court declines to find otherwise." *Id.* The court also rejected the defendants' earlier-filed motion to dismiss which had argued that the plaintiffs failed to state a breach of express warranty claim because plaintiffs did not sufficiently identify the warranty's terms, and the statements

[8] The *Weinstat* court went on to explain that the comments to Section 2313 indicate "[i]n actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement." *Id.* Further, that any "affirmation, once made, is part of the agreement unless there is clear affirmative proof that the affirmation has been taken out of the agreement." *Id.* at 1229.

were mere "puffery." *See Yamada v. Nobel Biocare Holding AG*, No. 2:10-cv-04849-JHN-PLAx, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss First Amended Class Action Complaint (C.D. Cal. Jan. 20, 2011), attached hereto as Exhibit A. The court concluded that statements that the implants offered reduced bone loss and less discomfort than other implants and that they could be implanted in a specific manner constituted warranties. *Id.* at 10. Further, the court found that plaintiff had pled he bought the implants "in reliance" on defendants' representations and that they formed the basis of the bargain.

D. Defendant's Representations Are Clear Affirmations of Fact and/or Promises

Defendant also argues (incorrectly) that "none of the challenged statements constitute an affirmation of fact or a promise."[9] [MTD at 21]. In order to plead a claim of breach of express warranty, a "plaintiff must allege the exact terms of the warranty." *Edmunson*, 2011 WL 1897625, at *5. Further, "[t]o constitute an express warranty, statements must describe specific characteristics of a product; vague or highly subjective product superiority claims often amount to non-actionable puffery." *Id.* An actionable affirmation of fact, as opposed to puffery is "a specific factual statement which could be established or disproved through discovery." *Annunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1141 (C.D. Cal. 2005); *see also Toyota*, 754 F. Supp. 2d at 1182-83 (holding claim that the vehicle's advanced technology throttle system enhanced safety was specific enough to constitute warranty).

Here, Defendant's representations at issue are ***not*** mere puffery as they are "specific factual statement[s] which could be established or disproved through discovery." In fact, the Independent Study commissioned by C&D has already disproved Defendant's representations.

[9] Defendant appears to posit a nonsensical argument that the "contract claim is predicated on the unsupported legal proposition that an advertising claim creates both a contractual obligation as to the claim's truthfulness ***and*** a contractually enforceable duty of the advertiser to have at hand scientific evidence to substantiate the claim." *Fraker v. Bayer Corp.*, No. CV F 08-1564 AWI GSA, 2009 WL 5865687, at *9 (E.D. Cal. Oct. 6, 2009) (emphasis in original) (dismissing claim that "Defendant's advertisements create[d] a set of express warranties and that Defendant's failure to substantiate those advertising claims constitute[d] breach"). The Complaint clearly alleges that Plaintiffs are seeking redress for Defendant's ***false*** statements, which can be and already have been disproved. Clearly, if Defendant makes a false statement, it will also not have any substantiation for that false statement, but that is not the focus of this action, and certainly not the focus of Plaintiffs' breach of express warranty claim.

Judge Nguyen's Order in *Yamada* is demonstrative. There, a dentist who purchased dental implants from the defendant manufacturers sued the defendants for, *inter alia*, breach of express warranty alleging that the defendants' implants were defectively designed. Ex. A at 2. The court denied defendants' motion to dismiss the breach of express warranty claims, reasoning that:

> Plaintiff's express warranty cause of action incorporates Defendants' alleged representations regarding the NobelDirect. Several of these representations constitute actionable affirmations of fact rather than puffery. For example, Plaintiff alleged Defendants' representations that the implants offered reduced bone loss and ***less discomfort than other implants.*** According to the FAC, Defendants also represented that the NobelDirect could be implanted without a surgical flap, through "the use of an easier gingival punch insertion site." ***These are both statements that could be proved or disproved through discovery and on which a consumer could reasonably rely in making a purchasing decision.***

Id. at 10.

In *Yamada*, defendants' statement that its implants offered less discomfort than other implants (which the court held is ***not*** puffery) is very similar to Defendant's representations in the instant case. Indeed, Defendant similarly represented that: (1) Clorox's "Fresh Step Scoopable litter with carbon is better at eliminating odors" than other cat litters containing baking soda; (2) Clorox's Fresh Step Scoopable cat litter "has carbon, which is more effective at absorbing odors than baking soda"; and (3) cats "are smart enough to choose" carbon-based Fresh Step "with less odors" over other cat litters with baking soda. These are all "specific factual statements which could be established or disproved through discovery," and thus, as the *Yamada* court held, this Court should similarly find that Defendant's claims are ***not*** puffery.

E. Privity Is Not Required in Plaintiffs' Express Warranty Claim

Finally, Defendant argues that Plaintiffs' "breach of warranty claim fails because there is no privity." [MTD at 21]. While Defendant correctly notes the "general rule" that privity of contract is required for an action for breach of express warranty, Defendant ignores the exceptions to that general rule. *See Clemens v. DaimlerChrysler Corp*., 534 F.3d 1017, 1023 (9th Cir. 2008) (noting that "[t]here are several exceptions to the privity requirement"). "A plaintiff may state a claim for breach of express or implied warranty without alleging privity, therefore, if he alleges facts suggesting that his case falls into one of the recognized exceptions to the general rule." *Garcia v. M-F Athletic Co., Inc.*, No. CIV. 11-2430 WBS, 2012 WL 531008,

at *2 (E.D. Cal. 2012) (citing *Margarita Cellars v. Pac. Coast Packaging, Inc.*, 189 F.R.D. 575, 580 (N.D. Cal. 1999)).

"The first [exception] arises when the plaintiff relies on written labels or advertisements of a manufacturer." *Id.* That is the case here. Plaintiffs clearly allege that they relied on Defendant's "written labels or advertisements" for Clorox's Fresh Step. "[Plaintiff] was exposed to and saw Clorox's marketing and advertising claims, purchased Fresh Step ***based on those claims***, and suffered injury in fact because of the unfair and deceptive trade practices described herein." [¶¶15-21]. "Plaintiffs and the Class were exposed to these statements and ***reasonably relied upon them*** in their purchase of Fresh Step." [¶160]. Thus, privity is not required, and Defendant's motion to dismiss should be denied.

VI. STANDING

A. Plaintiffs Have Sufficiently Alleged a Nationwide Class

Plaintiffs brought a nationwide class action under California consumer protection statutes on behalf of "[a]ll persons or entities that purchased Fresh Step cat litter in the United States." [¶49]. In the alternative to a nationwide class, Plaintiffs also brought the action on behalf of five subclasses under consumer protection statutes in California, Florida, New York, New Jersey, and Texas. [¶¶50-55]. Defendant's motion to strike the nationwide class and subclass allegations under Rule 12(f) is premature, unsupported by the law, and should be denied.

Under Rule 12(f), a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "Motions to strike are regarded with disfavor, as they are often used as delaying tactics, and should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Collins v. Gamestop Corp.*, No. C10-1210-TEH, 2010 WL 3077671, at *2 (N.D. Cal. Aug. 6, 2010) (citing *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991)); *see also Shein v. Canon U.S.A., Inc.*, No. CV 08-07323 CASEX, 2009 WL 3109721, at *3 (N.D. Cal. Sept. 22, 2009) (holding motions to strike are disfavored "because of the limited importance of pleadings in federal practice"). A court must

deny the motion to strike "if there is any doubt whether the allegations in the pleadings might be relevant in the action." *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2011 WL 2111796, at *13 (N.D. Cal. May 26, 2011). When considering a motion to strike, the Court must view the pleadings in a light most favorable to the non-moving party. *Id*. Here, Defendant has not met this heavy burden, as it cannot demonstrate at this early stage in the litigation that the nationwide class allegations clearly have no possible bearing in the action.

Defendant's motion should be denied for two reasons. First, it is premature. Class allegations are generally not tested at the pleadings stage, but, rather, after one party has filed a motion for class certification. *See Collins*, 2010 WL 3077671, at *2; *see also Astiana*, 2011 WL 2111796, at *14; *Beal v. Lifetouch, Inc.*, No. CV 10-8454-JST MLGX, 2011 WL 995884, at *7 (C.D. Cal. Mar. 15, 2011) (holding motion to strike class allegations premature at the pleading stage and refusing to strike such allegations because they are clearly relevant to the subject matter of the litigation). Courts in this District and in other districts in California routinely deny attempts to strike nationwide class allegations under California consumer protection laws at the pleading stage. *See Gooden v. Suntrust Mortg., Inc.*, No. 2:11-CV-02595-JAM, 2012 WL 996513, at *8 (E.D. Cal. Mar. 23, 2012) (denying motion to strike nationwide class allegations at the pleading stage and holding instead that "class definitions will be considered during the certification process"); *In re Jamster Mktg. Litig.*, No. 05CV0819, 2009 WL 1456632, at *7 (S.D. Cal. May 22, 2009) (denying motion to strike nationwide class allegations at the pleading stage because "[p]iece-meal resolution of issues related to the prerequisites for maintaining a class action do not serve the best interests of the court or parties"); *see also Baba v. Hewlett-Packard Co.*, No. C 09-05946 RS, 2010 WL 2486353, at *9 (N.D. Cal. Jun. 16, 2010) (denying motion to strike class allegations as unmanageable at the pleading stage); *In re NVIDIA GPU Litig.*, No. C 08-04312 JW, 2009 WL 4020104, at *13 (N.D. Cal. Nov. 19, 2009) (denying motion to strike and holding that "[a] determination of the ascertainability and manageability of the putative class in light of the class allegations is best addressed at the class certification stage of the litigation"). Thus, it is most appropriate to decide this issue at the class certification stage

rather than the pleading stage, and Defendant's motion to strike should be denied.

Defendant's reliance on *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978 (N.D. Cal. 2009), for the proposition that courts may strike class allegations at the pleading stage does not compel the striking of the nationwide allegations here. Importantly, the *Sanders* court did not hold that the sufficiency of class allegations must be decided at the pleading stage. Thus, it is not surprising that numerous courts have denied motions to strike nationwide class allegations, particularly after considering or mentioning the *Sanders* decision. *See Gooden*, 2012 WL 996513, at *8 (holding there is nothing in the *Sanders* decision that requires a court to consider the sufficiency of class definitions during a motion to dismiss or strike and denying the motion as premature); *Baba*, 2010 WL 2486353, at *9 (distinguishing *Sanders* and denying motion to strike class allegations as premature); *Shein*, 2009 WL 3109721, at *8, *10 (same); *Collins*, 2010 WL 3077671, at *3 (same).

Second, Defendant's motion to strike should also be denied because it has not met its burden to show that the nationwide class allegations clearly have ***no*** possible bearing or relevance in the action. Defendant's reliance on *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), for the proposition that a nationwide class cannot be certified under California consumer protection laws is a misstatement of the law and, in any event, inapposite at this stage of the proceedings.

The Ninth Circuit in *Mazza* did not hold that a nationwide class can never be certified under California consumer protection laws. This fact alone defeats Defendant's motion to strike.[10] *Mazza* was a class certification decision (*not* a decision on a motion to strike), in which the Ninth Circuit vacated and remanded a district court's class certification order only after (1) considering briefing that "exhaustively detailed" the class issues at hand, (2) applying an independent choice-of-law analysis, and (3) cautioning that the decision was based on the "facts and circumstances" of that case. *See* 666 F.3d at 591-94. For this reason, California district courts have distinguished the *Mazza* decision in denying motions to strike class allegations. In

[10] Defendant concedes as much, acknowledging that *Mazza* merely "strongly suggested" that a nationwide class could not be certified. [MTD at 22].

Donohoe v. Apple, Inc., No. 11-CV-05337 RMW, 2012 WL 1657119, at *7 (N.D. Cal. May 10, 2012), in denying defendant's motion to strike class allegations, the court determined that "[a]lthough *Mazza* may influence the decision whether to certify the proposed class and subclass, such a determination is premature. At this stage in the litigation – before discovery and prior to the parties submitting briefing regarding either choice-of-law or class certification – plaintiff is permitted to assert claims under the laws of different states in the alternative." Similarly, in *Bruno v. Eckhart Corp.*, No. SACV 11-0173 DOC EX, 2012 WL 752090, at *1 (C.D. Cal. Mar. 6, 2012), the court held that the *Mazza* decision did not warrant reconsideration of its prior decision certifying a nationwide class. The court found that *Mazza* was distinguishable because, among other things, the defendants in *Bruno* failed to exhaustively detail material differences in state laws at the class certification stage (not the pleading stage, such as here).[11] In sum, Defendant's motion to strike the nationwide class allegations at the pleading stage should be denied.

In the event the Court rejects Defendant's motion to strike the nationwide class allegations, which it should for the reasons stated above, Defendant then curiously argues that the subclass allegations should be stricken. [MTD at 23]. However, Defendant does not cite a single case in support of this proposition, *i.e.*, that subclass allegations can be stricken at the pleading stage for being too "complex."[12] *Id.* For the same reasons as those involving the

[11] Defendant's reliance on two cases that followed *Mazza* are also inapposite. In *Ralston v. Mortg. Investors Group, Inc.*, No. 5:08-CV-00536-JF PSG, 2012 WL 1094633 (N.D. Cal. Mar. 30, 2012), the court was adjudicating a motion for class certification, not a motion to dismiss. The *Ralston* court also emphasized that it "need not determine whether a nationwide class is precluded as a matter of law in ***all*** cases arising under California's UCL. But it concludes that such a class is precluded in ***this*** case," thus re-affirming that these issues need to be determined on a case-by-case basis at the class certification stage. *Id.* at *4 (emphasis in original). In *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2012 WL 1353057 (N.D. Cal. Apr. 18, 2012), the court granted a motion to dismiss plaintiff's UCL claim on the grounds that plaintiff was not entitled to restitution under that claim. After dismissing the claim on such grounds, the court then mentioned in a conclusory footnote, with no analysis or discussion, that even if the UCL had not been dismissed, it would face hurdles at the class certification stage under *Mazza*. *Id.* at *54-*55, n.13. The court did, as Defendant suggests, "follow[] *Mazza*." [MTD at 23].

[12] The only case cited by Defendant, *Utility Consumers' Action Network v. Sprint Solutions, Inc.*, 259 F.R.D. 484 (S.D. Cal. 2009), does not support its contention. *Utility Consumers'* is a case denying certification of a nationwide class, not dismissing a pleading or striking *subclass* allegations, such as Defendant argues here.

nationwide class allegations, Defendant's motion to strike the subclass allegations is premature and not supported by the law.

Subclasses are, of course, permissible under Rule 23(c)(5) and have long been utilized in class action litigation. Plaintiff has alleged only five subclasses, comprising consumers in California, Florida, New York, New Jersey, and Texas. Defendant fails to provide any reason (much less authority) as to why only five subclasses would be "complex and unmanageable," other than a conclusory statement. *Id*. As with the nationwide class, the appropriate time to address subclass issues is at the class certification stage of the litigation, not at the pleading stage. *See Donohoe*, 2012 WL 1657119, at *7 (permitting plaintiff to assert claims under the laws of different states in the alternative at the pleading stage); *see also Allen v. Hylands, Inc.*, No. CV 12-01150 DMG MANX, 2012 WL 1656750, at *2 (C.D. Cal. May 2, 2012) (holding *Mazza* "explicitly left open the possibility that a court could certify subclasses grouped around materially different bodies of state law") (citing *Mazza*, 666 F.3d at 594). Therefore, the Court should deny Defendant's premature motion to strike the subclass allegations.

B. The Non-Resident Plaintiffs Have Standing to Sue Under California Consumer Protection Laws

Defendant contends that the out-of state Plaintiffs do not have standing to bring claims under California consumer protection and unfair business laws. In support, Defendant makes a blanket statement that California's consumer protection laws do not have force or operate beyond the boundaries of California, relying on *Norwest Mortg., Inc. v. Super. Ct.*, 72 Cal. App. 4th 214 (1999). This is an incomplete statement of the law. As *Norwest* makes clear, California statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California. *Id*. at 224-25. Here, Plaintiffs allege a number of facts that show that Defendant's wrongful conduct emanated from California. [*See* ¶¶13, 68]. These allegations provide a sufficient basis at the pleading stage for Plaintiffs to bring claims under California consumer protection laws, and, thus, Defendant's motion should be denied.

The false and misleading misrepresentations and unfair business practices forming the basis of Plaintiffs' claims emanated from California. In support, Plaintiffs allege that: (1)

Clorox's principal place of business and corporate headquarters are located in California; (2) Clorox manufactures Fresh step cat litter in California; (3) Clorox regularly conducts substantial business in California; (4) significant decisions regarding the content and distribution of the marketing and advertising at issue occurred in California; (5) Clorox's marketing, promotional activities, and literature, including its warranties, were coordinated and/or developed at its California headquarters; and (6) a significant number of class members are located in California. *Id*. Thus, contrary to Defendant's contention [MTD at 25], Plaintiffs alleged that Defendant engaged in the wrongful conduct in California, among other things, and such conduct emanated from California.

Courts routinely permit non-resident plaintiffs to maintain claims under California consumer laws where some or all of the challenged conduct emanates from California. *See In re Mattel, Inc.*, 588 F. Supp. 2d 1111 (C.D. Cal. 2008) (holding alleged California connections sufficient to state UCL and CLRA claims by non-resident plaintiffs where misrepresentations made in advertising were reasonably likely to have come from or been approved by Mattel corporate headquarters in California); *Wang v. OCZ Tech. Group, Inc.*, 276 F.R.D. 618, 630 (N.D. Cal. 2011) (holding that plaintiff's allegations that defendant's misleading marketing and advertising information were conceived, reviewed, approved, and otherwise controlled from defendant's headquarters in California provided a sufficient basis at the pleading stage for the invocation of California law by non-resident plaintiffs); *Sutcliffe v. Wells Fargo Bank, N.A.*, No. C-11-06595 JCS, 2012 WL 1622665, at *16 (N.D. Cal. May 9, 2012) (holding Missouri couple's injuries resulted from defendant's conduct in California where correspondence relating to loan at issue came from defendant's address in California, among other things); *Fulford v. Logitech, Inc.*, No. C-08-2041 MMC, 2008 WL 4914416, at *1 (N.D. Cal. Nov. 14, 2008) (holding non-resident had standing to bring UCL and FAL claims because defendant's headquarters and its public relations and marketing staff are located in California, and the representations in question were disseminated from California); *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 589 (C.D. Cal. 2008) (holding application of California's UCL and CLRA appropriate by non-

residents where defendant has substantial presence in California, alleged misconduct emanated from California, and a significant number of class members reside in California); *In re Intel Laptop Battery Litig.*, No. C 09-02889 JW, 2010 WL 5173930, at *2 (N.D. Cal. Dec. 15, 2010) (holding application by non-resident of California's UCL is appropriate where alleged wrongful conduct originated in California, where both defendants were headquartered).

In *Mattel*, plaintiffs alleged that misrepresentations made in reports, company statements, and advertising were reasonably likely to have come from or been approved by Mattel's corporate headquarters in California. 588 F. Supp. 2d at 1119. The court found those allegations sufficient to state claims under the CLRA by non-resident plaintiffs. *Id.* Similarly, Plaintiffs here allege, among other California contacts, that the significant decisions regarding the content and distribution of the marketing and advertising at issue occurred in California, and Defendant's marketing, promotional activities, and literature, including its warranties, were coordinated and/or developed at Defendant's California headquarters. [¶¶13, 68]; *see also Mazza*, 666 F.3d at 590 (mentioning that non-resident class members had standing to bring California claims because the advertising agency that produced the fraudulent misrepresentations, defendant's corporate headquarters, and one-fifth of the proposed class members were located in California).

Defendants rely on several cases, none of which support its contention that the non-resident Plaintiffs in this case do not have standing to bring claims under the UCL, CLRA, or FAL.[13] Indeed, the cases cited by Defendants are materially different because plaintiffs in those cases failed to allege *any* wrongful conduct that occurred or emanated from California. Here, on the other hand, Plaintiffs have enumerated a wide array of such conduct. Thus, the Court should deny Defendant's motion to dismiss the claims of non-resident Plaintiffs.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendant's motion to dismiss be denied in its entirety, and for any further relief as the Court deems just and proper.

[13] *See Morgan v. Harmonix Music Sys., Inc.*, C08-5211BZ, 2009 WL 2031765 (N.D. Cal. July 30, 2009); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 785 F. Supp. 2d 883 (C.D. Cal. 2011); *Tidenberg v. Bidz.com, Inc.*, CV 08-5553 PSG(FMOx), 2009 WL 605249 (C.D. Cal. Mar. 4, 2009).

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